

- (1) Did claimant meet with personal injury by accident on or about June 27, 1993, while working for respondent?
- (2) Did claimant's accidental injury arise out of and in the course of his employment with respondent?

- (3) Are certain medical bills stipulated into evidence to be paid as authorized medical treatment?
- (4) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant originally alleged a series of accidental injuries through June 29, 1993. Claimant's E-1 was later amended to allege a series of accidents through June 27, 1993, while working for respondent. Claimant testified on several occasions in this matter, with the first time occurring at the preliminary hearing of March 11, 1994. At that time, claimant described his job as requiring the use of a chipping gun, which is about 18 inches long and weighing 20 to 25 pounds. It is an air-powered gun that is used to chip cement. Claimant had used the gun since the beginning of his employment with respondent in April 1993.

When claimant first testified, he stated that the gun kept kicking back at him and he felt pain in his side, indicating the lower right portion of his chest. Claimant told his supervisor, Jay Jones. When Mr. Jones, the labor foreman for respondent, testified, he acknowledged that claimant had approached him regarding pain in his side. Claimant told Mr. Jones that he had injured himself two or three days before, while using a small chipping hammer.

Claimant also presented the testimony of a coworker by the name of Ellis Baker, Jr. Mr. Baker recalled claimant approaching the foreman and advising him he had chest pain and he needed to go to the doctor. Claimant was running the chipping gun at that time, but Mr. Baker did not recall claimant mentioning anything about the gun or its involvement in his injury.

Claimant next testified at the preliminary hearing of November 18, 1994. At that time, claimant was asked about certain breathing difficulties he was experiencing after the June 1993 injury. Claimant testified the breathing difficulties began approximately four days after the June 1993 injury, which prompted him to go to the emergency room at St. Francis Hospital.

Mr. Jones, who testified in September 1996, was asked whether using the chipping hammer could cause someone to break ribs. Mr. Jones, who had used the chipping hammer on a regular basis, testified that there was no way a person could break their ribs

using a chipping hammer unless someone were to fall on the hammer. He had, in his personal experience, never seen anyone break a rib running a chipping hammer. He described the hammer as having approximately 15 pounds of pressure per square inch, and acknowledged running the hammers can be strenuous work, but stated the hammer does not have any type of recoil and does not come back at a person with the type of power required to break a rib.

Mr. Baker was also asked whether he felt the hammer could be involved in the injuries described by claimant. Mr. Baker acknowledged that the hammer was difficult and would occasionally jump and kick back. However, he did not believe the hammer had ever struck him in the chest.

At the regular hearing on July 3, 1997, claimant testified he was running the gun while kneeling on his right knee, with his hands in front of him. The point of the chipping hammer went between some rebar and he fell onto the gun, with the gun jumping and striking him in the chest on numerous occasions. The claimant's discomfort was now in the middle of his chest, approximately breast high, extending around to the right side, into the middle of claimant's back, and down to his belt line. Claimant further expanded the area of pain to include the left side of his chest.

On April 26, 1994, claimant was referred for medical treatment with Dr. Robert L. Eyster, a board certified orthopedic surgeon. At that time, claimant had pain in his thoracic cage over the rib region on the right side. Claimant also was experiencing some loss of motion in his right shoulder. Dr. Eyster treated claimant through August 1995, seeing him on several occasions. At no time during his examination of claimant did claimant ever indicate any low back difficulties. In addition, claimant's rib symptoms remained on the right side, with no deviation to the left. Dr. Eyster performed multiple examinations on claimant, ordering x-rays, CT scans, and MRIs. He referred claimant to neurologists for the purpose of evaluating claimant's ongoing complaints. Dr. Eyster could find no objective reasons for claimant's ongoing symptoms with the exception of certain stress fractures, which were diagnosed in claimant's ribs bilaterally. In particular, claimant was diagnosed with rib fractures on the right anterior, in the front, in the third, fourth, fifth, sixth, seventh, eighth and ninth ribs, which is an area greater than where claimant indicated he was struck. In addition, there were stress fractures diagnosed in claimant's left side, in an area where claimant did not describe being struck.

Claimant failed to mention the alleged injury to the left side of his ribs during either of the preliminary hearings. It wasn't until claimant testified at the regular hearing in 1997 that he alleged pain in the left side of his chest.

Dr. Eyster opined that the studies and test findings did not reveal any specific explanation for claimant's ongoing subjective complaints. The subjective complaints, which Dr. Eyster described as being significant, made Dr. Eyster think that an alternative cause

was in progress. He felt claimant either had symptom magnification, or perhaps that claimant might even be malingering.

Dr. Eyster assessed no functional impairment to claimant, but did place specific restrictions of no lifting over 30 pounds, no repetitive bending or twisting, and no repetitive pushing or pulling over 30 pounds. He acknowledged that he did not believe claimant had a permanent impairment, but felt it necessary to give him permanent work restrictions due to the claimant's significant complaints of pain.

Dr. P. Brent Koprivica, who examined claimant on November 9, 1995, also had questions regarding claimant's credibility. He measured claimant's grip strength, which would not be directly related to claimant's rib fractures. However, claimant stated that he was having difficulties feeling in his arms and was losing strength in his grip. While this made no sense from a rib fracture standpoint, it did give Dr. Koprivica the opportunity to test claimant's credibility. The grip strength testing administered on claimant did not produce a bell-shaped distribution, which is an indication claimant was not demonstrating his greatest capability. Non-bell-shaped curves indicate some limitation is occurring that is non-physical. It is a self-limitation, rather than a physical limitation. Dr. Koprivica also had difficulty finding objective data to support claimant's complaints. He found claimant's complaints to be exaggerated and believed symptom magnification was present. He assessed claimant a 10 percent whole person functional impairment, and included certain restrictions which would limit claimant to the medium physical level of the Dictionary of Occupational Titles. He was not able to say, within a reasonable degree of medical probability, that the restrictions placed on claimant resulted from the injury with the jackhammer.

Claimant was examined by Dr. Aly M. Mohsen in September 1994. Dr. Mohsen also diagnosed multiple rib fractures with posttraumatic myofascial pain syndrome. He assessed claimant an 11 percent impairment to the body as a whole, and restricted claimant from lifting 15 to 20 pounds on a frequent basis, 20 to 30 pounds on an occasional basis with the right upper extremity, and advised he limit the use of the right upper extremity to at or below shoulder level, and avoid lifting above shoulder level no more than 10 pounds on an occasional basis. Dr. Mohsen recommended claimant receive additional treatment, including physical therapy and a nerve block, but was provided no information regarding what ongoing treatment claimant later received with Dr. Eyster.

Finally, the Appeals Board considered the videotape placed into evidence by respondent. While the videotape is extremely short in length, lasting only approximately four minutes, it gives a clear picture of claimant during a brisk walk on August 26, 1997. This videotape, taken only four weeks after claimant's testimony at the continuation of the regular hearing, shows claimant walking briskly down a sidewalk with no apparent limitations. The videotape contradicts claimant's allegations that he has significant ongoing complaints, and is unable to look for work because he cannot walk more than three blocks without having a burning sensation and pain which requires that he rest for 10 to

15 minutes. The claimant, in the videotape, walked at a brisk pace with no apparent limitation and no outward signs of pain.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish claimant's right to an award of compensation, proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1992 Supp. 44-501 and K.S.A. 1992 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

It is claimant's burden to show his entitlement to benefits by a preponderance of the "credible" evidence. In instances where an administrative law judge has the opportunity to view live testimony, the Appeals Board will generally give deference to the administrative law judge's conclusions regarding the credibility of witnesses. However, in this case, the Administrative Law Judge deciding the case was not the Administrative Law Judge who had the opportunity to view claimant testifying at either the preliminary or regular hearings.

This case hinges substantially upon claimant's credibility. The medical evidence does not support a finding that claimant has suffered a severe injury arising out of and in the course of his employment. Claimant's description of the incident changes from the preliminary hearings in 1994 to the regular hearing in 1997. It is more than coincidence that claimant's description of the incident with the jackhammer mirrored Mr. Jones' comments that a person could not break a rib using a jackhammer unless they fell on it. Claimant did not describe an incident at preliminary hearing where he fell on the jackhammer. However, after Mr. Jones testified in September of 1996, claimant's testimony, at the regular hearing in 1997, adopted the very description presented by Mr. Jones in his testimony.

The medical evidence also does not support claimant's contentions. Claimant described an incident where he was struck by the handle of the jackhammer on the right side of his ribs. Originally, the pain was in the right ribs, with some radiation around to the back. Later, claimant testified to pain in the right ribs, going around to his back, and proceeding down to his belt line. Even later, claimant modified his description of the incident to include pain on the left ribs. The x-rays and other tests performed on claimant indicated numerous bilateral stress fractures. The description of the injury provided by claimant, even in its best light, cannot justify the multiple rib fractures found on both sides of claimant's rib cage. It is also significant that Dr. Eyster, who examined and treated claimant from April of 1994 through August of 1995, was provided no indication of a low

back injury. By the time claimant reached regular hearing, however, his complaints involved substantial difficulties with the low back.

Generally, in workers' compensation litigation, uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Claimant's testimony, were it consistent, might be sufficient to persuade the Appeals Board that an accident did occur on or about June 27, 1993. However, claimant's testimony, as presented to the Court, and the histories, provided by claimant to the various examining and treating physicians, modify substantially over a three-year period. The description of the accident itself, the extent of the complaints, the area of complaint, all change dramatically. In addition, the videotape shows a claimant capable of walking at a brisk pace without apparent limitation, which contradicts claimant's testimony regarding what he can and cannot accomplish physically.

The Appeals Board finds claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment on the date alleged, and in the manner described. The Appeals Board, therefore, finds that the Award of the Administrative Law Judge should be reversed, and claimant should be denied benefits for the alleged injuries occurring through June 27, 1993. This finding renders the remaining issues presented by the parties moot.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated March 24, 1998, should be, and is hereby, reversed, and the claimant, Agustin R. Contreras, is denied an award against the respondent, Gilbert Central Corporation, and its insurance carrier, Aetna Casualty & Surety Company, for an alleged injury occurring through June 27, 1993.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

Nora Lyon & Associates	
Transcript of preliminary hearing	\$133.60
Appino & Biggs Reporting Service	
Deposition of Ellis Baker, Jr.	\$ 80.90
Transcript of regular hearing	\$253.70
Braksick Reporting Service	
Transcript of preliminary hearing	\$104.20

Hostetler & Associates, Inc.	
Deposition of Don Vander Vegt	\$209.10
Deposition of Jay Jones	\$161.00
Alpha Reporting Service	
Deposition of Aly M. Mohsen, M.D.	\$109.20
Hutchison Court Reporting	
Transcript of continuation of regular hearing	\$ 67.00
Deposition Services	
Deposition of Robert L. Eyster, M.D.	\$262.40
Deposition of Karen Crist Terrill	\$167.30
Metropolitan Court Reporters, Inc.	
Deposition of P. Brent Koprivica, M.D.	\$282.30
Deposition of Daniel R. Sterba	Unknown

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Gregory D. Worth, Lenexa, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director